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No. 97-1337

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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QUESTIONS PRESENTED

On July 29, 1837, the United States and thirteen bands of Chippewa Indians executed the Treaty with the Chippewa of 1837, 7 Stat. 536. Article 5 of the 1837 Treaty guarantees the bands the privilege of hunting and fishing on the lands ceded by them to the United States "during the pleasure of the President of the United States."

1. Was an 1850 Presidential Order revoking the Indians' special hunting, fishing and gathering privilege effective, where the 1837 Treaty reserved that privilege to the Indians only "during the pleasure of the President"?

2. Was a hunting, fishing and gathering privilege, reserved only "during the pleasure of the President," "temporary and precarious" and therefore extinguished under *Ward v. Race Horse*, 163 U.S. 504 (1896) when Minnesota was admitted to the Union on an equal footing with the original thirteen states?

3. Is language in an 1855 treaty "fully and entirely relinquish[ing] . . . any and all right, title, and interest, of whatsoever nature . . . in and to any other lands in the Territory of Minnesota" sufficient to extinguish a previously reserved hunting, fishing and gathering privilege in an area of Minnesota?

PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellants below, are the State of Minnesota, its Governor, Arne Carlson, and several officials of the Minnesota Department of Natural Resources. Other defendants-appellants below are nine Minnesota counties and eight private landowners who were allowed to intervene at various stages of the litigation: County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine; John W. Thompson; Jenny Thompson; Joseph Karpen; Leroy Burling; Glenn Thompson; Gary Kiedrowski; Robert J. Edmonds; and Michael Sheff.

Respondents, plaintiffs-respondents below, are eight Chippewa Bands located in Minnesota and Wisconsin, a number of individual band members, and the United States Government: Mille Lacs Band of Chippewa Indians and four of its members, Arthur Gahbow, Walter Sutton, Carleen Benjamin and Joseph Dunkley; United States of America; St. Croix Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewas; Bad River Band of Lake Superior Chippewa Indians; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Sokaogan Chippewa Community; Red Cliff Band of Lake Superior Chippewa; Fond du Lac Band of Chippewa Indians and five of its members, Robert Peacock, Peter Defoe, Clifton Rabideaux, Herman Wise and George Dupuis.

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OPINIONS AND DECISIONS BELOW

The Eighth Circuit opinion is reported at 124 F.3d 904 (1997) and reprinted in the appendix to the Petition for Certiorari ("PA") at 1. That opinion affirmed the following orders and rulings of the District Court, which also are reprinted in the petition appendix: *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118 (D. Minn. 1994) (*Mille Lacs I*) (PA 351); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994) (*Mille Lacs II*) (PA 212); *Mille Lacs Band of Chippewa Indians v. Minnesota*, unreported, No. 3-94-1226 (D. Minn. Mar. 29, 1996) (*Mille Lacs III*) (PA 164); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997) (*Mille Lacs IV*) (PA 74); *Fond du Lac Band of Chippewa Indians v. Carlson*, unreported, No. 5-92-159 (D. Minn. Mar. 18, 1996) (PA 419).

JURISDICTION

The court of appeals entered its judgment on August 26, 1997. PA 1. A timely petition for rehearing with suggestion for rehearing en banc was denied on November 17, 1997. PA 482. The petition for certiorari was filed February 17, 1998, and granted on June 8, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, TREATIES AND ORDERS INVOLVED

Treaty with the Chippewa, July 29, 1837, art. 5, 7 Stat. 536 (PA 484); Treaty with the Chippewas, Feb. 22, 1855, art. I, 10 Stat. 1165 (PA 502); Act of May 11, 1858, 11 Stat. 285 (PA 515); Executive Order, President Zachary Taylor, Feb. 6, 1850 (PA 565).

STATEMENT OF THE CASE

This case involves a dispute between the State of Minnesota and eight Chippewa Bands (collectively the

"Bands") located in Minnesota and Wisconsin over the State's authority to regulate the harvest of fish and game in a uniform, nondiscriminatory manner for all citizens within the territory ceded by the Bands to the United States in a nineteenth century treaty. The dispute arises from the Bands' assertion that the hunting and fishing privilege the Bands reserved in Article 5 of the Treaty of 1837 continues to exist and that, as a result, the State's authority to regulate those activities by Band members within the ceded territory is severely limited, and that the State is obligated to modify its regulations of non-Indians and its management of those natural resources to accommodate a defined "treaty harvest."

Historical Background

In the 1700s, the Chippewa Indians occupied a large area of the Northwest Territory, including much of present-day Michigan, Wisconsin and Minnesota. Different tribal subgroups, called "bands," moved into separate areas that provided resources for subsistence living. The Chippewa bands' locations in the Wisconsin and Minnesota territories became fairly permanent homelands in the nineteenth century. However, the advance of white settlement that began at the turn of that century brought tremendous changes to the area historically occupied by the Indians, changes that would required adaptation and compromise.

The Chippewas' history is similar to that reflected in other cases considered by this Court. With the continued presence of traders in the early 1800s, and the advance of lumbermen, agricultural settlers, missionaries and commercial activity along the river and lake routes, the Indians' land became the focus of competition for resources. The federal government was committed to facilitating the rapid settlement of the area and access to the substantial mineral and timber wealth.

From the time the Northwest Ordinance was adopted in 1787, the policy of the United States government was to enter into treaties with the Indians in the Northwest Territory, providing compensation in exchange for the cession of their aboriginal title to the land they occupied. PA 226. Sometimes this cession was subject to continued occupancy and exercise of hunting and fishing privileges on the ceded lands. *Id*. By 1830, however, because of the continuing pressure of expansion through white settlement and resource development, the federal policy was to remove the remaining Indians west of the Mississippi. PA 225-26. On May 28, 1830, Congress authorized the President to set up land districts west of the Mississippi for the Indians' removal. 4 Stat. 411 (JA 20). Congress also appropriated $500,000 to carry out that removal program. *Id*.

In 1837, Congress provided additional express authority to the Indian Department "for holding treaties with the various tribes of Indians east of the Mississippi river, for the cession of lands held by them respectively, and for their removal west of the Mississippi." Act of March 3, 1837, 5 Stat. 158 (JA 27). Following the enactment of this law, Wisconsin Territorial Governor Henry Dodge entered treaty negotiations with representatives of twelve different Chippewa bands at Fort Snelling (located in what is now Minneapolis, Minnesota). PA 229.

On July 29, the United States and the Bands executed the Treaty with the Chippewa of 1837 ("the 1837 Treaty"). PA 484. Article 5 of the Treaty, which is the sole basis for the Bands' claims in this case, contains the following key provision:

> Article 5. The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, *during the pleasure of the President of the United States.*

PA 486 (emphasis added). The federal government's primary goal was to extinguish Indian title so that the lands

could be opened to lumbering, while also allowing white settlement whenever the government might desire it. PA 227-31. While the number of white settlers in the 1837 Ceded Territory was not yet large, the pressure for white expansion into the area was growing. PA 223-24.

The Journal of the 1837 Treaty Negotiations describes how Chippewa spokesmen requested that the government use the Chippewa lands only for a period of years, and that the Indians retain the lands that the government was requesting on a permanent basis for hunting, fishing and other purposes. JA 70-76. In response to the Indians' negotiation inquiries, Governor Dodge explained that the government was not interested in "leasing" the land, and twice said the hunting and fishing privilege the Indians were reserving was temporary in nature. Dodge stated:

> It is proper for me to explain to you that your Great Father [the President] never buys land for a term of years. I will agree on the part of the President, that you shall have the free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States, during his pleasure. If you sell these lands, you must sell them as all the other nations of Indians have done . . . .

JA 73-74. The next day, Governor Dodge told the Indians:

> I will make known to your Great Father, your request to be permitted to make sugar on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years before your Great Father will want all these lands for the use of his white Children.

JA 78.

White settlement and expansion of commerce continued to increase. In response to this pressure, and despite the opposition of many Indians, the federal government remained committed to the policy of removing Indians westward throughout the 1840s. The 1848 report of the

Commissioner of Indian Affairs (COIA) included Commissioner Medill's statement that

> the Chippewas, as heretofore stated, are remaining by sufferance on lands which have been ceded to the United States, and from which, looking only to their own benefit, they should soon be required to move.

JA 138-39. The 1849 COIA report echoed that theme, stating that the Chippewa

> are permitted to live in the ceded country until required to remove by the President, and are allowed to hunt and fish therein until notice is given that the privilege must cease and as it is anticipated this requisition will soon be made and the notice speedily given . . . .

JA 145. The 1849 COIA Report also stated:

> The time has arrived when the interests of the Indians, as well as the interests of the citizens of Minnesota Territory, require that the privilege granted the Chippewas to occupy, for a limited period, the country purchased of them in the treaty of 1837, should terminate.

JA 147.

On October 11, 1849, in one of its first acts, the Legislative Assembly of the new Territory of Minnesota passed a resolution to Congress urging the removal of the Chippewas living on ceded lands east of the Mississippi to unceded lands west of the river. PA 566-68. That resolution received the endorsement of the Territorial Governor, the Commissioner of Indian Affairs. JA 673-75, 878-79, 976-77. Congress, in turn, sent the resolution on to the President. JA 674-75.

On February 6, 1850, President Zachary Taylor responded to these calls for the Chippewas' removal and for a resolution to Indian-white conflict in the region by issuing an Executive Order to accomplish two distinct objectives: (1) it expressly terminated any special hunting, fishing, and gathering privilege and (2) it ordered the

removal of the Chippewas from the ceded territories. The Order provided:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States . . . *are hereby revoked;* and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to the unceded lands.

PA 565 (emphasis added).

The Chippewa opposed removal to such an extent that, by June 1851, the new Commissioner of Indian Affairs concluded that removal was not in the interests of the United States, and recommended that the Executive Order be modified to allow those Chippewa who so desired to remain in the ceded territories. PA 259-60. In August 1851, the removal efforts were temporarily suspended by direction of the Acting Secretary of the Interior "until the final determination of the President." JA 225. While active removal efforts were effectively ended, the 1850 Executive Order was never revoked, and no federal official even recommended revoking or modifying the portion of the Order terminating the Indians' hunting and fishing privilege.

By 1854, a new Indian policy emerged, focusing on reservations rather than removal. PA 264, 275. On December 19, 1854, Congress passed a law authorizing the President to negotiate with the Chippewa "for the extinguishment of their title to all the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." Act of Dec. 19, 1854, 10 Stat. 598 (PA 532). The Act further directed that any new treaties must contain provisions "[g]ranting to each head of a family, in fee simple, a reservation of eighty acres of land." *Id.* This

new "allotment" requirement showed that the new federal policy was to place the Indians on established reservations, and encourage them to become farmers. Moreover, the Act in the fourth provision of section one provided that "[t]he laws of the United States and the Territory of Minnesota shall be extended over the Chippewa territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian Country'. . . . " PA 533.

On February 22, 1855, the Mille Lacs (along with other bands not parties here) agreed to the 1855 Treaty. PA 502. Article 9 contains the Bands' agreement "that they will settle down," begin farming, build homes, and educate their children. PA 512-13. The "land" provisions of the 1855 Treaty are most important here. Article 2 established the boundaries of the new reservations. PA 503-05. Article 1 then completed the exchange:

> The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries . . . . *And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.*

PA 502-03 (emphasis added). Unlike the 1837 Treaty, the 1855 Treaty did not reserve any special hunting, fishing, and gathering privilege on ceded lands for the Indians. *Id.*

In May 1858, Minnesota was admitted to the Union as a State "on an equal footing with the original states." Act of May 11, 1858, 11 Stat. 285 (PA 515). At its first session, the new state Legislature enacted laws regulating hunting. The Legislature expressly extended the reach of

those laws to Indians off their reservations. 1858 Minn. Laws, chs. XIX, XLIV (PA 569). Since that time, Minnesota has always applied its game and fish laws to Indians off the reservation just as it has applied them to other citizens. PA 298-300.

Almost a century later, beginning in 1940, the Minnesota and Wisconsin Chippewa Bands brought various claims against the federal government for, among other things, alleged fraud, misrepresentation, and inadequate compensation in the negotiation of the treaties. The Bands sought compensation for the range of rights and interests that were ceded in the treaties. The claims were first brought before the Court of Claims, PA 39, and then, after Congress created the Indian Claims Commission ("ICC") in 1946, the Bands refiled complaints with the ICC. PA 45. The ICC ultimately awarded the Bands $9 million collectively to resolve all claims under the 1837 Treaty. The ICC determined that this amount was necessary to compensate the Bands for the full value of the ceded lands, determined according to their "highest and most valuable uses." PA 47.

Procedural History

Beginning in 1990, the Bands sued the State of Minnesota and its officials challenging their authority to enforce state hunting and fishing laws against Band members within the 1837 Ceded Territory. PA 9-10. In 1993, nine counties and six private landowners intervened as defendants, and the United States intervened as a plaintiff. PA 10.

The district court divided the *Mille Lacs* case into two phases – the first to address whether the 1837 privilege still existed, and its general nature, and the second to address the allocation of fish and game resources as well as the validity of particular State regulation of any continuing treaty right. PA 11. Following a Phase I trial, the court ruled that the Mille Lacs Band had a continuing

privilege under the 1837 Treaty to hunt, fish and gather. PA 350. It also ruled that the privilege applies only on public lands or those private lands that are open to the general public for hunting. PA 337-38.

In ruling for the Bands, the court rejected all of the State's defenses. First, the court held that President Taylor's express revocation of the Bands' treaty privilege in his 1850 Executive Order (PA 565) was invalid because the Order was primarily a "removal" order and the President did not have authority to order removal. The court held that the revocation portion of the Order was not severable, and so also must be held invalid. PA 306-12. Alternatively, even if the revocation provision was severable, the court held that the provision of the Executive Order was still invalid on the grounds that it was inconsistent with the Indians' claimed understanding that the privilege could be revoked only if they misbehaved, that the Order violated the good faith requirement of the Northwest Ordinance, and that the Order had been repealed by implication. PA 313, 321.

The district court also rejected the State's contention that the 1855 Treaty extinguished the Mille Lacs Band's privilege in the 1837 Ceded Territory. PA 331. The court ruled that there was no explicit language within the 1855 Treaty terminating the Band's hunting and fishing privilege, and that the historical context surrounding the 1855 Treaty, and the Band's understanding of the Treaty, showed that the privilege was not extinguished. PA 322-31.

On March 29, 1996, the court ruled that six Wisconsin Chippewa Bands, who had intervened several months earlier, also had continuing rights to hunt and fish in the Minnesota portion of the 1837 Ceded Territory. PA 210. The decision was largely predicated on the district court's earlier decision in Phase I of *Mille Lacs*. But the court also addressed the State's new contention that the Bands'

privilege was extinguished when Minnesota was admitted into the Union on equal footing with the original thirteen states.[1] It ruled that the Bands' 1837 Treaty privilege was continuing in nature, not temporary, and therefore the equal footing doctrine established in *Ward v. Race Horse*, 163 U.S. 504 (1896), did not apply to extinguish the privilege upon the State's admission into the Union. PA 187-89.

At the same time the *Mille Lacs* case was proceeding, the State was also involved in a similar lawsuit involving the 1837 Treaty with the Fond du Lac Band. PA 14. On March 18, 1996, the district court ruled that the Fond du Lac Band also retains a hunting, fishing and gathering privilege under the 1837 Treaty; the decision was also largely predicated on the 1994 district court ruling in the *Mille Lacs* case. PA 457-64.

In June 1996, the district court consolidated the Phase II portions of the *Mille Lacs* and *Fond du Lac* cases. PA 14-15. Phase II addressed the allocation of game and fish resources between Band hunters and fishers and others, and also the validity of particular state regulations as applied to Band harvest. PA 15. On January 29, 1997, the district court issued an Order resolving all pending motions in Phase II of the consolidated cases. PA 74. The January 29 Order directed the entry of final judgment in the *Mille Lacs* case and with respect to the 1837 Treaty claim in the *Fond du Lac* case. PA 162.

The court's January 1997 Order resolved several disputes regarding management of the resources within the Ceded Territory. It held that state biologists may no longer unilaterally set the level of harvest ("harvestable surplus") for particular species, but rather must share that regulatory authority, permanently, with the Bands. If the parties cannot agree, the federal court will resolve the

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[1] This defense had not been raised previously with respect to the Mille Lacs Band.

resource management issues. PA 87-101. Although the State and Bands had reached agreement on many resource regulation matters through a stipulation, the court also addressed unresolved disputes over prohibiting the "shining" of deer over bait in December, and the taking of fish in small lakes by gillnet. The Court rejected the State's arguments that these two activities should be prohibited because of specific conservation concerns over the impact on the deer and fish, holding that the "State's power to regulate Indian treaty rights is very narrow," and that the State must demonstrate that its regulation is necessary "to forestall the imminence of extinction." PA 119. The court held that the State's measures must be the "least restrictive alternatives," and the State could not even act to prevent the complete eradication of deer in a local area, if the area would be naturally repopulated from other areas. PA 119-20. Upon the Bands' adoption of their "Model Conservation Code," State officials were permanently enjoined from any action that would prevent or interfere with the exercise of the Bands' privilege to hunt, fish and gather under the 1837 Treaty except as authorized in the opinions and orders of the court. PA 158-59.

A panel of the Eighth Circuit affirmed the decisions of the district court on all grounds. PA 1. The circuit court rejected the contention that President Taylor's 1850 Order terminated the Bands' privilege, holding that the President was not authorized to issue the order, and the revocation portion of the two-part order was not severable from the remainder. The court did not address the additional grounds in the district court decision for rejecting the President's revocation of the hunting and fishing privilege. PA 29-31. The circuit court also rejected the contention that the equal footing doctrine, in this factual context, extinguished the 1837 Treaty privilege. PA 55. Finally, the Eighth Circuit agreed with the district court that the language of the 1855 Treaty was not explicit

enough to extinguish the privilege reserved in the earlier treaty. PA 36-37. In doing so, it deferred to the lower court's factual findings regarding the Indians' understanding of the treaty language. *Id.*[2]

The State sought rehearing and suggested rehearing en banc, but the court of appeals denied both motions on November 17, 1997. PA 482. This Court granted certiorari on June 8, 1998.

SUMMARY OF ARGUMENT

The Eighth Circuit decision here substantially and, more important, unnecessarily encroaches on Minnesota's core sovereign function of safeguarding and regulating the use and taking of the State's game and fish resources. The lower courts here misused the rules of treaty construction to turn the key treaty provisions on their heads, interpreting "during the pleasure of" to mean "for cause," "any and all interest" to mean "only some interests," and "any other lands in Minnesota" to mean "only some other lands in Minnesota."

The Bands' hunting, fishing and gathering privilege under the 1837 Treaty was effectively terminated by any of three different events – President Taylor's 1850 Order, the 1855 Treaty (applicable here only to the Mille Lacs Band) and Minnesota's admission into the Union in 1858. However, contrary to the plain language of the two treaties and this Court's pronouncement about the effect of statehood, the district court and the Eighth Circuit held that each of these bases for extinguishment of the privilege under the 1837 Treaty was inapplicable, and that the special privilege to hunt, fish and gather, free of most state regulation, continues to this day and prevents

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[2] The lower courts also addressed numerous other issues that were not raised in the State's petition for certiorari, and so are not at issue here.

Minnesota from exercising full sovereignty over its natural resources in three million acres of the State's prime hunting and fishing area.

Under the Treaty, the privilege of hunting, fishing and gathering in the 1837 Ceded Territory was guaranteed only "during the pleasure of the President." In 1850, President Taylor issued an Executive Order expressly revoking the temporary treaty privilege. However, the district court held that the Treaty did not actually authorize the President to revoke the privilege. Contrary to the obvious import of the Treaty's "during the pleasure of" language, the district court interpreted the Treaty provision to have an unwritten condition that the privilege could be revoked only if the Indians misbehaved. While the court purported to apply the special, liberal rules of treaty construction, in fact the court ignored the Treaty's *plain* language, and added the misbehavior condition even though there was not a single bit of evidence that, at the time of the Treaty, the federal negotiators or Congress understood such a condition to apply. The interpretation was based only on speculation as to what the Indians might have understood.

The Mille Lacs Band also relinquished any remaining hunting, fishing and gathering privilege in the 1837 Ceded Territory when it signed the 1855 Treaty "fully and entirely relinquish[ing] and convey[ing] to the United States, any and all right, title, or interest, of whatsoever nature the same may be, which they now have in, and to, any other lands in the territory of Minnesota or elsewhere." While this language would obviously appear to extinguish any remaining hunting, fishing and gathering privilege in Minnesota based upon the 1837 Treaty, the lower courts applied the rules of treaty construction to reach conclusions wholly at odds with the plain treaty language. Instead of "any and all right, title, and interest, of whatsoever nature the same may be," the courts found that the key language in the 1855 Treaty did not apply to

some rights and interests, specifically the 1837 hunting, fishing and gathering privilege. And despite the fact that the all-encompassing relinquishment applied to rights and interests in and to "any other lands in the territory of Minnesota or elsewhere," the district court found that the provision applied to *some* Minnesota lands, but not those ceded in 1837. The lower courts based their interpretations on supposed historical context, even though there was no evidence that any of the parties, at the time of the 1855 Treaty, understood the relinquishment provision to be limited.

In making these interpretations, the lower courts ignored this Court's oft-repeated admonitions that, even in the context of Indian treaties, courts may not ignore the agreements' plain language and, in effect, amend the treaties. *See, e.g., United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900). Historical evidence must be virtually conclusive to overcome "the 'almost insurmountable presumption' that arises from the statute's plain terms." *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 802 (1998). The historical evidence here, even if it could be interpreted to favor the Bands, was not so overwhelming as to overcome the plain treaty language.

Regarding the 1850 Presidential Order, the circuit court did not reach the interpretation issue, but instead held that the order was invalid because another provision (for the *removal* of the Indians) was unauthorized. The court then held that the revocation of privileges was also invalid because it was not severable. But the court's decision shows that it reversed the presumption in this Court's caselaw that a separate valid provision should be upheld unless it is evident that it *would not have been* enacted without the invalid provision. *See Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Despite its conclusion that there was an obvious reason why the President may have adopted the revocation provision on its own, the court erroneously

held the provision invalid because it was not shown that the President *would have* adopted that provision separately.

Finally, the circuit court failed to recognize the importance of Minnesota's sovereign interest as a state. Because the treaty privilege was guaranteed only "during the pleasure of the President," it was certainly "temporary and precarious" within the contemplation of this Court's decision in *Ward v. Race Horse*, 163 U.S. 504 (1896), and was therefore extinguished when Minnesota was admitted into the Union on an "equal footing" with the original states in 1858. The circuit court incorrectly distinguished *Ward*, holding that the treaty privilege here was not temporary, precarious, or perishable, and that the limitations imposed here on the State's ability to manage its natural resources are not "irreconcilable" with Minnesota's sovereignty.

There may be some basis for the lower courts' concerns that the federal government did not treat the Indians fairly in making the 1837 Treaty. But this Court has rejected the notion that perceived injustice in the negotiation of Indian treaties should be corrected by judicially recrafting the treaty provisions. *See United States v. Mille Lac Band*, 229 U.S. 498, 500-01 (1913). Rather, the forum to recompense overreaching in these old treaties was the Indian Claims Commission and, as explained above, the Bands made such claims and were compensated for the *entire value* of the lands ceded in the 1837 Treaty. Consequently, there is no reason for the courts to struggle to avoid the obvious effect of the treaty language at issue here, or to fail to acknowledge the full scope of Minnesota's sovereignty upon admission to the Union.

ARGUMENT

I. THE 1850 PRESIDENTIAL ORDER TERMINATED ANY SPECIAL PRIVILEGE TO HUNT, FISH AND GATHER.

Article 5 of the 1837 Treaty provides: "The privilege of hunting, fishing, and gathering wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, *during the pleasure of the President of the United States.*" PA 486 (emphasis added). Pursuant to this authority, on February 6, 1850, President Zachary Taylor responded to calls for a resolution to Indian-white conflict in the Minnesota Territory by issuing an executive order expressly terminating the privilege. The Executive Order provided:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice, upon the lands, the rivers, and the lakes included in the territory ceded" by that treaty to the United States . . . *are hereby revoked;* and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

PA 565 (emphasis added). Thus, the temporary hunting and fishing privilege reserved under the 1837 Treaty, upon which the Bands' claims in this case are solely based, was expressly terminated by federal action.

A. The Treaty Gave The President Sole Discretion To Revoke The Privilege.

The district court erroneously determined that the treaty did not authorize the President's order revoking the treaty privilege. The Bands' hunting, fishing and gathering privilege was guaranteed only "during the pleasure of" the President. Nothing else in the treaty

restricts the President's discretion. There can be no serious dispute that the ordinary meaning of the phrase "during the pleasure of" in legal documents such as treaties is that the designated person or entity has the sole discretion to decide to take the contemplated action.[3] There can be no doubt that Congress, in approving the treaty, would have understood the phrase to have this meaning.

Nonetheless, the district court interpreted Article 5 to contain an additional, implicit, limitation on the President's authority – that he could revoke the privilege only due to Indian misbehavior. PA 313-14.[4] Thus, the district court interpreted the key treaty phrase to mean *the opposite* of its normal meaning. The court essentially interpreted "during the pleasure of" to mean "terminable for cause."[5]

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[3] *See, e.g., Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) (reservation created by executive order "conveys no right of use or occupancy . . . beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States . . . . "); *Bishop v. Wood*, 426 U.S. 341, 345-46 n.9 (1976) ("at pleasure of" means "terminable at will . . . irrespective of the quality of performance by the other party").

[4] The Seventh Circuit had previously made the same holding in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 356-57 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983). Years earlier, however, the Court of Claims had concluded that the parties' intention was that "the Indians were to have only a revocable license to use the land until the President required them to vacate it." *Mole Lake Band v. United States*, 139 F. Supp. 938, 940 (U.S. Ct. Cl.), *cert. denied*, 352 U.S. 892 (1956).

[5] *See Arnett v. Kennedy*, 416 U.S. 134, 181 (1974) (White, J., concurring and dissenting) (action "for cause" distinguished from "at pleasure"; "at pleasure" means "total discretion," *quoting Reagan v. United States*, 182 U.S. 419, 425 (1901)).

In reaching this conclusion, the district court applied the well-known special rules of construction for Indian treaties.[6] But the district court violated the first rule of treaty construction, that courts in Indian cases are

> *without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty.* Its duty was to ascertain the intent of the parties according to established rules for interpretation of treaties. Those rules, it is true, permit the relations between the Indians and the United States to be taken into consideration. *But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then a court cannot amend the treaty or refuse to carry out the intent of the parties,* as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent on the other, or because in the judgment of the court the Indians may have been overreached.

United States v. Choctaw Nation, 179 U.S. 494, 535 (1900) (emphasis added). And the Court has more recently reemphasized that the plain meaning of a treaty provision is the overriding element of treaty construction. *See, e.g., South Carolina v. Catawba Indian Tribe*, 476 U.S. 498,

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[6] These canons of construction generally require (1) that treaties be liberally construed in favor of the Indians, *see, e.g., Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); (2) that ambiguous expressions in treaties must be resolved in favor of the Indians, *see, e.g., Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); and (3) that treaties should be construed as the Indians would have understood them, *see, e.g., Worcester v. Georgia*, 31 U.S. 515, 551-54 (1832).

506 (1986); *Oregon Dep't of Fish & Wildlife v. Klamath*, 473 U.S. 753, 774 (1985).

The district court's conclusion that the treaty contained an unwritten misbehavior standard rests on the slenderest of reeds. The Indians did not speak English, and some observers described the government translators as incompetent. PA 229. The Bands produced expert testimony indicating that treaty concepts would have been difficult to translate into the Chippewa language, and the experts speculated that the Indians would not have understood the concept of "at the pleasure of the President." PA 230, 235, 315. The court emphasized the importance of hunting, fishing and gathering to the Indians. PA 231.

Despite the speculation of the Bands' experts and the district court, there was not an iota of evidence from the treaty negotiations that the Indians did not understand the meaning of "during the pleasure of the President." Since the Indians did not understand English, their understanding of any of the treaty provisions would have necessarily derived entirely from what someone told them. However, when the State asserted that English-speaking persons at the negotiations who were friendly to the Indians may have explained the treaty provisions to them, the court dismissed it as "speculation rather than hard evidence of actual translations." PA 315.

The treaty journal, the best evidence of what occurred at the negotiations, contains no evidence that the Indians did not understand the key treaty term or that anyone at the negotiations discussed a misbehavior standard. But the journal does indicate that the Indians *were* told that the privilege was temporary. Indeed, the government negotiator told the Indians: "[Y]ou will be allowed, during his pleasure, to hunt and fish on [the lands]. It will probably be many years, before your Great Father [the President] will want all these lands for the use of his white Children." PA 233. In the years between the

adoption of the treaty and the President's order, the federal government asserted that the Indians' reserved hunting, fishing and gathering privilege was subject to the President's discretion, as indicated by annual reports of the Commissioner of Indian Affairs. JA 138-39, 145; PA 244, 253.[7]

Even viewing the historical evidence most favorably to the Bands, it was at best equivocal as to whether the Indians understood, or would have understood, the 1837 Treaty language to mean anything other than its normal meaning. And the Bands' evidence consisted of the speculation of their expert linguist and historians who had no actual knowledge of what the Indians understood or what was explained to them at the time they agreed to the Treaty. There was no evidence that the federal treaty negotiators, or Congress in approving the treaty, understood the treaty provision other than in its normal sense. Thus, the situation here is similar to that in *Klamath*, where the Court observed: "The historical record of the lengthy negotiations between the Tribe and the United States provides *no reason to reject the presumption that the 1901 Agreement fairly describes the entire understanding between the parties*." 473 U.S. at 772 (emphasis added). *See also South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 802 (1998) (equivocal evidence of historical context of Indian reservation statute insufficient to rebut the " 'almost insurmountable presumption' that arises from the statute's plain terms").

It is also significant that the President, who was authorized by the Treaty to revoke the hunting, fishing and gathering privilege, interpreted the Treaty to authorize him to do so at his sole discretion. An executive

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[7] And in the century after the President's 1850 Order, many federal officials, including President Franklin Roosevelt, took the position that the Order had terminated the Indians' hunting, fishing and gathering rights under the treaty. PA 298-300.

action, when executed by the President pursuant to an Act of Congress, is "supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (citation omitted). The district court's decision here was contrary to the express language of the treaty, and the historical evidence was plainly insufficient to overcome the strong presumption of validity of the President's action and his interpretation of the Treaty.

"The canon of construction regarding the resolution of ambiguities . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Catawba*, 476 U.S. at 506. The language of Article 5 is plain. The only plausible meaning to ascribe to the phrase "pleasure of the President" is that the President was authorized to revoke the privilege at his discretion.

There can be no question that this is how Congress would have understood the treaty. During the mid-1800s, it was not unusual for Congress to delegate broad authority regarding Indian affairs to the President. In 1834, for example, Congress enacted Rev. Stat. § 465, 4 Stat. 738 (recodified as 25 U.S.C. § 9), which states: "The president may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." Moreover, Congress ratified many Indian treaties providing that the President was responsible for implementing the specific conditions and agreements in Indian treaties. Such treaties used the phrases "during the pleasure of the President," "during the pleasure of the Secretary of Indian Affairs," or "during the pleasure of the Government" to describe when and how the federal government would satisfy its responsibilities under Indian treaties.[8] The common

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[8] Several other treaties negotiated during the 1830s contained the phrase "during the pleasure of the President." *See*

usage of these phrases and similar ones is evidence that Congress relied upon the president and the executive branch to unilaterally determine how best to satisfy treaty obligations.

Indeed, when Congress wanted to limit or condition the president's discretion in a treaty, it did so expressly. By the time of the 1837 Treaty, Congress and the executive were well acquainted with treaties that expressly conditioned or limited Indian hunting and fishing privileges depending on, for example, the Indians' behavior.[9] No such language exists in the 1837 Treaty.

Even in Indian treaties, if the meaning of language to Congress is evident, the courts should require *conclusive*

1833 Treaty with the Pawnee, art. 2 (JA 1946); 1833 Treaty with the Quapaw, art. 6 (JA 1933); 1832 Treaty with the Sauk and Foxes, art. 7 (JA 1938). Like the 1837 Treaty, the 1833 Pawnee Treaty used the phrase with regard to temporary hunting and fishing rights. Similarly, after 1850, Indian treaties continued to use the phrase "pleasure of the President," providing the President with discretion over a wide ranging set of responsibilities. *See* 1858 Treaty with the Yankton Sioux, 11 Stat. 743; 1856 Treaty with the Creek, 11 Stat. 699; 1858 Treaty with the Ponca, 12 Stat. 997; 1857 Treaty with the Pawnee, 11 Stat. 729.

See also 1862 Treaty with the Ottawa of Blanchard's Fork and Roche de Boeuf, art. 11, 12 Stat. 1287 (pleasure of the Secretary of Interior); 1805 Treaty with the Cherokee, art. 1, 7 Stat. 95 (pleasure of the government); 1819 Treaty with the Cherokee, art. 3, 7 Stat. 195 (same).

[9] For example, Article VI of the 1805 Treaty with the Wyandot, 7 Stat. 87, provides that the Indians "shall be at liberty to fish and hunt . . . as long as they shall demean themselves peaceably." Similarly, Article III of the 1818 Treaty with the Quapaws, 7 Stat. 176, states that "the said tribe or nation shall be at liberty to hunt within the territory by them ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury or annoyance to any of the citizens of the United States . . . . "

evidence to overcome the "almost insurmountable presumption" created by the treaty's plain meaning. The historical evidence on this point did not favor the Bands. But even given its most generous assessment, the evidence was not nearly so powerful as to overcome the plain language of the Treaty.

B. The Provision Of The President's Order Revoking The Privilege of Hunting, Fishing and Gathering Is Severable From The Removal Provision.

The circuit court did not resolve the interpretation issue just discussed. Rather, it addressed the presidential order argument by holding that the provision requiring that the Indians be removed from the Ceded Territory was invalid, because the President was not authorized to order the Indians' removal without their consent. PA 27. The court then held that the revocation provision was not severable from the removal provision, so that the revocation could not stand alone. PA 31. That holding was erroneous. The appellate court reversed the presumption of severability, and held that the revocation provision could not be severed from the removal provision, even though there was no evidence that the President would not have issued the revocation portion of the order by itself.

The severability standard, for legislative acts, was established in *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932):

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature *would not have enacted* those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

(Emphasis added.) The court "should refrain from invalidating more of the statute than is necessary"; rather, "it is the duty of this court to . . . maintain the act in so far as it is valid." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). The court of appeals here, like other circuit courts, assumed that this same standard for severability would also apply to presidential orders. PA 27; *citing In re Reyes*, 910 F.2d 611, 613 (9th Cir. 1990).

However, after correctly reciting the standard, the appellate court then reversed the presumption, saying, "The task before us, therefore, is to determine whether President Taylor *would have* issued an executive order revoking the Bands' treaty rights without also ordering removal." PA 28-29 (emphasis added). The court agreed with the district court that the overriding purpose of the order was to effect the Indians' removal from the Ceded Territory, and that the provision revoking the hunting, fishing and gathering privilege was included "to encourage removal." PA 29. And the court acknowledged that, if the goal was to obtain the Indians' removal, there was a "strong argument" that the president would have revoked the treaty privilege, even without the removal provision, in order to encourage the Indians to move to their remaining unceded lands. *Id.* (Indeed, one of the Bands' experts testified that the revocation provision was likely included to encourage the Indians to remove, saying the government understood there was no direct authority for removal in the treaty. JA 1098-99.) However, the appellate court asserted that "there is no evidence in the record that revocation of usufructuary rights *would have* been made independently of the removal mandate" (emphasis added), and then concluded: "Without evidence that the scenario we have outlined had even been contemplated, we cannot sever the revocation portion of the order . . . . " PA 29-31.

Thus, the appellate court acknowledged the obvious reason why the President would have issued the revocation order alone, even assuming the correctness of the district court's finding that the overall purpose of the order was removal. But rather than trying to preserve as much of the order as possible, and requiring a showing that the President *would not have* adopted the revocation provision by itself, the lower court invalidated the revocation order because there was not sufficient evidence that it would have been adopted on its own.

Moreover, even if the question had been whether the President *would have* adopted the revocation provision independent of the removal provision, the origins of the presidential order show that the privilege to hunt, fish and gather under the 1837 Treaty was raised as a separate concern. In September 1849, the new governor of the Minnesota Territory argued for the Chippewas' removal, saying:

> Much complaint is made by the settlers about Sauk Rapids, Swan River &c as to the demoralizing effects of the privilege given the Chippeways, in the Treaty of 1837, to hunt and fish upon the lands ceded by said Treaty. It might be well for the Legislative Assembly, to memorialize the President of the United States, requesting him to notify the Chippeways that these privileges must cease and requiring them to move into their proper territory.

JA 878. The following month, the territorial legislature approved such a resolution. PA 252. The resolution was endorsed by the territorial governor and the Commissioner of Indian Affairs. JA 673-75, 878-79, 976-77. Congress in turn, sent the resolution to the President, who issued the order in February 1850. JA 674-75; PA 253. Therefore, there *was* evidence to support the conclusion that the President would have issued the order revoking the temporary treaty privilege, even without the removal provision.

The Eighth Circuit erred in holding that the revocation provision of the 1850 Order was not severable. It could undoubtedly operate independently of the removal provision,[10] and the record did not show that the President would not have issued it independent of the removal provision.

C. The 1850 Order Did Not Violate A Duty Of Good Faith, And Was Not Revoked By Implication.

The district court rejected the argument that the 1850 Order effectively revoked the Indians' hunting, fishing and gathering privilege for two additional reasons. It held that the revocation violated an obligation of "good faith" imposed by the Northwest Ordinance. PA 313, 316. And it held that the Order was repealed by implication. PA 321.[11] Each of these rulings was erroneous.

The Northwest Ordinance required that "utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent . . . . " 1 Stat. 51, art. 3 (1787) (JA 16). The district court held that the President's order revoking the temporary treaty privilege violated this good faith requirement. But the Indians had conveyed

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[10] The fact that the two provisions of the order could operate separately, and were intended to do so, is best illustrated by the situation of the Fond du Lac Band, which did not live in the Ceded Territory, but nonetheless claimed hunting, fishing and gathering rights there under the 1837 Treaty. JA 1492-1507. Since only the revocation provision of the 1850 Order applied to the Fond du Lac Band (as well as other bands, not parties here, who were parties to the Treaty but did not live in the ceded territory), that provision had significance independent of the removal provision.

[11] Because of its ruling that the removal provision was invalid and the revocation provision was not severable, the circuit court did not reach these issues. PA 31 n.25.

their land, for compensation, in the 1837 Treaty. While the Treaty reserved the privilege of hunting, fishing and gathering, this privilege was guaranteed only "during the pleasure of President." Thus, it was the Treaty, itself an act of Congress, which resulted in the diminishment of the Indians' rights; the President simply exercised the authority clearly granted in the Treaty. Where an act of Congress subsequent to the Northwest Ordinance authorized the President's action, that action cannot be found invalid on the basis that it was inconsistent with the earlier Ordinance. *See Ward v. Race Horse*, 163 U.S. 504, 513 (1896). Accordingly, if the Treaty is interpreted as the State has argued above, there was no violation of any requirement of good faith.

Nor was the President's order repealed by implication. The district court cited evidence that the federal government's removal effort met resistance from the Indians, that federal officials recommended abandonment of the removal effort, that they recommended modification of the removal requirement of the order, and that the removal effort was finally abandoned. PA 255-64, 320-21. From this, the district court found that "the executive branch" intended to repeal the President's order. PA 321.

But while there was evidence that federal officials intended to suspend the *removal effort*, there was no evidence that the *President* ever revoked or modified, or even considered revoking or modifying, his order. And there was no evidence that any federal official recommended reversal of the portion of the order revoking the hunting, fishing and gathering privilege; all the discussion concerned the removal portion of the order.

It is a "cardinal rule" that repeals by implication are not favored. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (rejecting implied repeal of statute). There was no basis for the district court to conclude that the provision revoking the hunting, fishing and gathering privilege was repealed.

D. There Is No Reason Here To Depart From The Plain Language Of The Treaty And The Presidential Order.

There can be little doubt here as to the result that must follow from the clear language of the 1837 Treaty and the 1850 Presidential Order. The lower courts nonetheless determined that the Indians' treaty privilege to hunt, fish and gather continues to exist, largely free of state regulation, based primarily on the liberal rules of treaty construction and, apparently, on the belief that the federal government did not deal fairly with the Indians in the making of the treaty. While concern over past injustices is wholly understandable, this Court, in another treaty case involving the Mille Lacs Band, cautioned against viewing the law to allow reformation of treaties because of perceived exploitation of the Indians:

> Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of supposed injustice to the Indians.

United States v. Mille Lac Band, 229 U.S. 498, 500-01 (1913).

As explained above, the Bands here filed claims with the Indian Claims Commission in the late 1940s, and ultimately received an award to compensate them for the full value of the lands ceded in the 1837 and other treaties, less amounts previously received. The value of the land, and the amount of compensation paid to the Bands, was based on the land's "highest and most valuable uses," without any deduction for a reserved hunting, fishing and gathering privilege. PA 47. On its face, such compensation was adequate to compensate the Indians for all uses of the land, including hunting, fishing and gathering. *See Klamath*, 473 U.S. at 773-74 (compensation for full value of land, without reduction for value of hunting and fishing rights, presumably includes those

rights). Thus, to the extent that the Bands were inadequately compensated under the 1837 Treaty for relinquishing all their rights to the Ceded Territory, including the hunting, fishing and gathering privilege, the federal government appropriately made recompense through the ICC procedure. But after receiving fair compensation for the entire value of the land, the Indians should not benefit from strained application of the canons of treaty construction and perversion of the treaty's plain language to recognize continued special rights relating to the land.

Much doubt will be cast on many statutes, treaties and other important documents if the courts hold that the ubiquitous phrase "during the pleasure of" may mean "for cause." There is no ground to make such a startling holding here. Under the clear language of the 1837 Treaty and the 1850 Order, the Indians' hunting, fishing and gathering privilege temporarily reserved in the treaty was subsequently extinguished.

II. THE TEMPORARY HUNTING, FISHING AND GATHERING PRIVILEGE WAS EXTINGUISHED WHEN MINNESOTA WAS ADMITTED INTO THE UNION

The equal footing doctrine requires that all states admitted into the Union after the original thirteen states have the same rights and sovereignty at the time of admission as the original states. *See Ward v. Race Horse*, 163 U.S. 504, 515 (1896); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196-98 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981). Included in that bundle of rights are the states' sovereign trust and police powers over the taking of game and fish within their borders, the "power to preserve and regulate the exploitation of an important resource." *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 386 (1978). As this Court stated in *Ward*, the right of a state to completely regulate hunting and fishing within its borders is an essential attribute of its governmental existence. 163 U.S. at 510. Like

the presumption against federal preemption of state law, the equal footing doctrine creates a strong presumption against finding that federal actions supersede the exercise of a state's trust responsibility to manage natural resources for all its citizens.

In this case, the Bands' privilege to hunt and fish under the 1837 Treaty was extinguished through application of this doctrine when Minnesota entered the Union because the privilege was, pursuant to the holding of *Ward*, temporary and perishable by the express terms of the Treaty.

A. Under *Ward*, A Treaty-based Right Does Not Survive Statehood Where That Right Is Temporary Or Precarious.

Ward established the framework for determining whether Congress intended a pre-statehood treaty-based right to survive a state's admission into the Union. The relevant treaty provision there secured to the Bannock Indians "the right to hunt upon the unoccupied land of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." 163 U.S. at 507. In determining whether this right to hunt had been extinguished when Wyoming was admitted into the Union, the Court began its analysis by recognizing that the full power of the state to regulate killing of game within its borders was an "essential attribute" and a "necessary incident" of state sovereignty. *Id.* at 510, 516.

Next, the Court analyzed whether Congress *intended* the right to continue when it admitted Wyoming into the Union in 1890. The Court emphasized that there is a presumption that states are admitted into the Union with the fullest set of rights and attributes of sovereignty. The Court observed that the "equal footing" language in Wyoming's enabling act was "simply an expression of the general rule that presupposes that states, when admitted,

are endowed with the powers and attributes equal in scope to those enjoyed by the states already admitted . . . . " *Id.* at 514-15. The Court said that Wyoming's enabling act contained no expression of an intention to continue the treaty right in the state. *Id.* at 515. Rather, the Act expressed Congress's intention *not* to continue the treaty right. *Id.*

The Court explained that the equal footing doctrine does not prevent the United States from creating a treaty right which would be binding upon the state on its admission into the Union:

> Indeed, it may be further, for the sake of the argument, conceded that, where there are rights created by congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of congress to continue them in the state, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the territory was essentially *perishable, and intended to be of a limited duration*. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when, in fact, *the privilege given was temporary and precarious*.

Id. (emphasis added). The "temporary and precarious" versus "continuing and perpetual" distinction was based on the Court's balancing of two competing interests – honoring the commitments made in Indian treaties, while at the same time limiting encroachment on core areas of state sovereignty to the extent possible. The Court said:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that

> salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language, and in conflict with an act of congress, and also destructive of the rights of one of the states.

Id. at 516. Where hunting rights were temporary, precarious and perishable, such that the treaty contemplated that the federal government could negate those rights, then the Court held that there would be a presumption that Congress intended to grant full sovereignty in that area to the newly created state and to terminate the Indians' special hunting privilege when the state was created. The presumption was that Congress intended to give new states the fullest measure of sovereignty possible, consistent with binding obligations of previous treaties.

The Court in *Ward* held that the Bannock Indians' rights were precarious and perishable because the treaty clearly contemplated the disappearance of the right to hunt:

> Indeed, it made the right depend on whether the land in the hunting districts was unoccupied public land of the United States. This, as we have said, left the whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts.

Id. at 509-10. The lands in question could become unavailable for treaty exercise, either when the United States transferred title to a private party or occupied the land itself by the creation of a national reserve (such as the creation of Yellowstone Park). *Id.* at 510. Thus, because the ability of the Bannock Indians to exercise the rights was perishable from the very inception of the treaty, it

was a temporary right that did not survive Wyoming's admission into the Union.[12]

United States v. Winans, 198 U.S. 371 (1905), decided just nine years after *Ward*, illustrates the flip side of the *Ward* distinction. In *Winans*, the Court rejected the equal footing argument under the facts of that case, holding that a treaty right "of taking fish at all usual and accustomed places, in common with the citizens of the territory," 198 U.S. at 378, "was intended to be continuing against the United States and its grantees as well as against the state and its grantees." *Id.* at 381-82.

B. The Privilege Reserved By Article 5 Of The 1837 Treaty Was Temporary And Precarious.

The 1837 Treaty at issue here reserves the Bands' privilege to hunt, fish and gather only "during the pleasure of the President." As discussed in the previous section, this privilege is temporary and precarious by its express terms. The phrase "at the pleasure of the President" provides for the potential extinguishment or revocation of the Bands' privilege at any time. The President's authority to terminate the privilege under Article 5 is not conditioned or limited in Article 5 or elsewhere in the Treaty. Nowhere in the Treaty or in any other congressional act or authorization is the President required to seek the approval of Congress or the Bands before revoking the Bands' 1837 Treaty privilege.

Indeed, the precariousness of the Treaty privilege here is even more immediately apparent than was the case in *Ward*. The phrase "during the pleasure of" clearly

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[12] In *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), the Tenth Circuit applied *Ward* to a treaty having nearly identical language to the treaty at issue in *Ward*, and rejected the argument that *Ward* had become outdated. The conflict between *Repsis* and the lower court's decision here is one of the bases for the State's Petition for Certiorari.

communicates that the privilege is perishable on its face. Moreover, the federal negotiator told the Indians that the retained privilege was of limited duration, and that the President would eventually need the land for white settlers.[13]

1. The Eighth Circuit erred in holding that *Ward* was distinguishable.

In this case, the Eighth Circuit distinguished *Ward* for two reasons. First, the court ruled that the holding in *Ward* applied only to rights that were tied to the United States' ownership of the land. The court of appeals then went on to conclude that, because in this case the privilege of hunting and fishing was not tied to federal ownership of the land, the principle in *Ward* did not apply. PA 55.

While it is true the treaty-based rights in *Ward* were tied to United States ownership of the land, that was merely the particular circumstance that, in *Ward*, made the right temporary. The focus was the temporary, rather than permanent, nature of the right. The Court stated in *Ward*, "Indeed, the whole argument of the [Indians] rests on the assumption that there was a perpetual right conveyed by the treaty, *when in fact the privilege given was temporary and precarious.*" 163 U.S. at 515 (emphasis added). But the Court in *Ward* did not suggest that the right's dependence on federal ownership was the only circumstance that could make a treaty right temporary and precarious. Moreover, even apart from the "pleasure of the President" treaty language, the Bands' privilege to hunt, fish and gather here was temporary and perishable

[13] Even if this Court were to rule that the President could revoke the privilege only if the Bands misbehaved, as ruled by the district court, the privilege would still be temporary and precarious for purposes of the equal footing doctrine. But the Court need not go that far here.

for essentially the same reason that such rights were determined temporary in *Ward* – that the privilege would be frustrated by the conveyance of the land to private parties.

In the trial court, the Bands here conceded that the treaty provided them no right of access to private lands to exercise their hunting, fishing and gathering privilege, and therefore that they could exercise their privilege only on public lands and certain private lands open to the public by operation of state law. PA 215 n.2. The trial court so held. PA 337-38, 104-05.[14] Thus, while the trial court did not hold, and the Bands do not concede, that their hunting, fishing and gathering privilege was *extinguished* when the United States sold land in the ceded territory to private parties, PA 335-36, it is clear that such lands became *unavailable* to the Indians for hunting, fishing and gathering when the lands were conveyed to private parties who do not make the lands generally open to the public.

The Bands' privilege here was therefore precarious and perishable from the inception of the Treaty, for the very reason identified by this Court in *Ward*: the lands may become unavailable for Indian hunting, fishing and gathering simply because the United States transfers title to a private party. In *Ward*, this occurred because the treaty right applied only on lands "of the United States"; here, it occurred because the Treaty provided no right of access onto private land. Nonetheless, the practical result – that the land would become unavailable for Indian hunting, fishing and gathering by the unilateral and

[14] While the Bands appealed one aspect of the district court's order determining which private lands would be available for treaty hunting, fishing and gathering, they did not seek review of the circuit court's adverse ruling in this Court, PA 70-72, and they have never asserted that they may exercise their claimed rights on private lands absent consent of the landowner.

unrestrained act of the United States in transferring title to the land – is the same in each case. Moreover, the lower court's determination presents the same irony identified in *Ward* – that the Bands are prevented from exercising the special privilege to hunt, fish and gather by the mere conveyance of the land to private parties, who lack authority to regulate the taking of game and fish, but not by the creation of a new sovereign state that has the authority and responsibility to regulate such activities. 163 U.S. at 510.

The court of appeals' second reason for distinguishing *Ward* was its opinion that, even though the Bands' 1837 hunting and fishing privilege could be revoked by the President, or abrogated by Congress like any other treaty right, this did not deprive the privilege of its continuing nature. PA 55-56 n.42. Certainly Congress always has the ability to abrogate any treaty right, and this underlying possibility does not make every treaty right temporary or precarious within the contemplation of *Ward*. But, absent authority in the treaty, the President would not have authority to revoke a right preserved by treaty. The specific provision here allowing the President to terminate the privilege at his discretion clearly made the privilege perishable from its inception. The 1837 Treaty expressly contemplated the future disappearance of the Bands' privilege.

2. The act admitting Minnesota into the Union did not reserve treaty rights.

In 1858, Congress passed an act admitting Minnesota into the Union on "equal footing with the original States in all respects whatever." 11 Stat. 285 (PA 515). The Act is silent as to the Indians' 1837 Treaty privilege. As *Ward* held, the silence of an act is, in and of itself, an expression of Congress' intention to terminate treaty-based rights which were not by their very terms meant to be permanent. 163 U.S. at 515. In addition, Minnesota's Act of

Admission did not contain a savings clause for treaty rights, as did some state admission acts. *See Ward*, 163 U.S. at 506, 515-16, 519; *Tulee v. Washington*, 315 U.S. 681, 683 (1942).

C. The Bands' Privilege Is Incompatible With Minnesota's Ability To Manage Its Natural Resources.

This Court has long recognized that a state has the authority to hold and manage its natural resources in trust for the benefit of all citizens in common. *See Hughes v. Oklahoma*, 441 U.S. 322, 338-39 (1979); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("unquestionably, the States have broad trustee and police powers over wild animals within their jurisdiction"); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (each state has authority and responsibility for applying the public trust doctrine to trust lands and waters "within its border according to its own views of justice and policy"). The Bands' 1837 Treaty privilege to hunt and fish off-reservation outside of state law is irreconcilable with the State's ability to enforce its laws uniformly as to all persons within its jurisdiction.

Minnesota's interest in natural resource management is as important to its sovereignty as is its interest in owning and controlling the use of the beds of lakes and rivers.[15] Under the lower courts' decisions, however, Minnesota's policymaking discretion over the natural resources in almost three million acres of east-central Minnesota is sharply curtailed. The State will operate under perpetual federal court supervision to determine whether Minnesota's rules and policies must be altered to accommodate tribal treaty harvest, subject to different tribal rules and policies. Minnesota no longer will have the authority to unilaterally make management decisions

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[15] *Cf. Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2041 (1997); *Utah Div. of State Lands*, 482 U.S. at 195.

regarding a wide variety of natural resource issues within the ceded territory.

Under these rulings, whenever the Bands and the State cannot agree on how to manage a particular resource, the federal court will be the final arbiter of how that resource is managed. In essence, the federal court will operate as an appellate biologist, asked to evaluate highly scientific and technical considerations related to species and land use. The court will rule in favor of the State only if the State proves that its position is based on narrowly proscribed conservation, public safety or health considerations, where conservation is defined as those restrictions necessary to "forestall the imminence of extinction." PA 119.

The district court held that, upon request of the Bands, the court will review and, if necessary, overrule, the State's determination of the harvestable surplus for a given species. PA 87-101. Some examples of the highly scientific and technical decision-making issues that already have been decided by the federal court in this case include determining if the use of gillnets in lakes under 1000 acres will result in overharvest given the intensive nature of this type of harvest in small waterbodies, PA 121-27, and determining if the shining of deer, over bait, in December, will lead to overharvest because of deer concentration in winter, thereby thwarting the State's integrated deer management plans, PA 112-21. The lower court acknowledged that, "although the State may have commendable and sound reasons for its proposed regulations [on such issues], it is nonetheless constrained by the . . . Bands' treaty rights." PA 119.

In addition to the scientific and biological decisions already made by the federal court in this case, there are many other natural resource management decisions the federal court may have to resolve in the future if a dispute arises between the Bands and the State. These

decisions cover a wide variety of issues, including, but not limited to:

- which lands in the ceded territory may be protected as scientific and natural areas;
- which lands in the ceded territory may be acquired for an expanded state park;
- what recreational uses for specific tracts of land in the ceded territory may be deemed compatible with other resource goals for an area;
- what aquatic species in a waterbody within the ceded territory may be introduced or eradicated;
- how many animals of a given species in the ceded territory, or subpart of the ceded territory, are appropriate for the carrying capacity of the ecosystem; and
- what species to promote in a given area or waterbody within the ceded territory by natural and artificial means.

To comply with the lower courts' rulings, the State will have to ensure that its decisions on these issues, and many others, do not adversely affect the Bands' treaty-based privilege. If a decision will adversely affect the Bands' Treaty privilege, the State will have to modify its decision to eliminate the effect, or risk the prospect that the Bands or United States will invoke the federal court's continuing jurisdiction. If the Bands or the United States challenge the State's decision, then (as has already occurred) the federal court will have the ultimate authority to determine how Minnesota's natural resources in the ceded territory will be managed.

In addition to the grounds described above, the circuit court distinguished *Ward* by saying that the Bands' hunting, fishing and gathering privilege here is not irreconcilable with the State's sovereignty, as the Court in *Ward* concluded. PA 56-58. The circuit court cites other

decisions of this Court in which the treaty rights were found to be continuing, so that the State was required to adjust its game management to accommodate those rights. *See, e.g., United States v. Winans*, 198 U.S. 371 (1905); *Tulee*. But the Court need only look at the trilogy of *Puyallup* cases[16] to appreciate the extent to which continuing Indian hunting, fishing and gathering privileges encroach on the State's sovereign interest in managing fish and game in a non-discriminatory manner. There can be no doubt that, as observed in *Ward*, the continuation of special Indian hunting, fishing and gathering privileges carves out a significant slice of the State's core sovereign interests, and requires the State to share that area of sovereignty with the Bands under the ultimate supervision of the federal court. What *Ward* holds is that it is presumed that Congress intended to avoid this intrusion on state interests when a new state is created, unless the federal government previously made permanent commitments to the Indians. Because the treaty here made no such binding commitment, the temporary treaty privilege was extinguished upon Minnesota's statehood.

III. THE 1855 TREATY, IN WHICH THE MILLE LACS BAND RELINQUISHED "ANY AND ALL RIGHT, TITLE AND INTEREST" TO ALL LANDS WITHIN THE MINNESOTA TERRITORY, EXPRESSLY EXTINGUISHED ANY REMAINING HUNTING, FISHING AND GATHERING PRIVILEGE.

Finally, if the hunting, fishing and gathering privilege reserved in the 1837 Treaty was not extinguished earlier, the Mille Lacs Band's privilege under that treaty

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[16] *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977).

was relinquished when several Chippewa bands, including the Mille Lacs Band, signed the 1855 Treaty.[17] The applicable language of the 1855 Treaty is simple and all-encompassing. The Chippewa ceded a large area of the northwest portion of the Minnesota Territory. In addition to this cession, the treaty provided:

> And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the Territory of Minnesota or elsewhere.

PA 503. The import of this language for this case is self-evident: the signatory bands relinquished all right and interest in any Minnesota lands, including any remaining hunting, fishing and gathering privilege in the 1837 Treaty area. The lower courts, however, applied "interpretation" principles to conclude that the language did not mean what it said – that the parties had not meant to extinguish *"any* right or interest of whatsoever nature," and that contrary to the phrase "any other lands in Minnesota or elsewhere," the parties intended to impose a geographic limitation on the treaty provision.[18]

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[17] The Mille Lacs Band is the only plaintiff band in this case that was a party to the 1855 Treaty. Therefore, if the State were to prevail on this issue alone, the Mille Lacs Band would not have a special hunting, fishing and gathering privilege in the Minnesota portion of the 1837 Ceded Territory, but the other plaintiff bands, including the Wisconsin Bands, would.

[18] Contrary to the lower court decisions here, the Minnesota Supreme Court, in *State v. Keezer*, 292 N.W.2d 714, 721 (Minn. 1980), held that the 1855 Treaty extinguished the hunting, fishing and gathering privilege reserved under the 1837 Treaty.

A. This Court Previously Has Found Essentially The Same Treaty Language To Extinguish Hunting And Fishing Rights Reserved In An Earlier Treaty.

This Court has previously held that treaty language containing such an all-encompassing relinquishment of rights is effective to extinguish previously reserved hunting and fishing rights. In *Oregon Dep't of Fish & Wildlife v. Klamath*, 473 U.S. 753 (1985), the Klamath Indians had executed an 1864 Treaty ceding "all their right, title and claim to all the country claimed by them," and received a 1.9 million-acre reservation and the exclusive right of fishing and gathering within the reservation. *Id.* at 755. Then, in a 1901 agreement, the Klamaths agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" approximately a third of the 1864 reservation in exchange for monetary compensation. *Id.* at 760. The 1901 Agreement contained no language expressly referring to hunting and fishing rights, and further provided in a savings clause that "nothing in this agreement shall be construed to deprive [the Tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement." *Id.* at 760-61. In 1982, the Klamaths sued the State of Oregon, claiming a continued right to hunt and fish on the land ceded in the 1901 Agreement and arguing that the 1901 Agreement did not extinguish those rights.

Reversing the lower courts, this Court held that language ceding "all claim, right, title, and interest in and to" land also extinguished any special hunting and fishing rights reserved on those lands, and should not be ignored in the face of purported ambiguity surrounding the Indians' understanding of the cession. 473 U.S. at 765-66. Rejecting the tribe's argument that express reference to hunting and fishing is necessary to extinguish such rights, this Court said that silence with regard to the

preservation of off-reservation hunting and fishing rights does not show an intent to preserve the previously reserved rights. Rather, the silence "is consistent only with an intent to end any special rights of the Tribe outside the reservation." *Id.* at 773 n.23. This conclusion is particularly noteworthy given the presence of the "savings clause" in the 1901 Agreement, which provided a basis for the Tribe's argument that it had intended to preserve hunting and fishing rights separate from the land cession. There is no similar "savings clause" in the 1855 Treaty here.

In this case, the Eighth Circuit distinguished *Klamath's* strong extinguishment mandate almost entirely on the single assertion that the rights in *Klamath* were exclusive and on-reservation rights, whereas the privilege at issue in this case was a non-exclusive and off-reservation privilege. PA 39. Contrary to the Eighth Circuit's conclusion, however, this Court in *Klamath* directly addressed the impact of the "all right, title and interest" language to *off-reservation* hunting and fishing rights. The Court explained that, because the land ceded by the Klamath Tribe was no longer part of the reservation, the off-reservation rights claimed by the Tribe were somewhat comparable to the off-reservation rights reserved in the Treaty construed in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968), and *United States v. Winans*, 198 U.S. 371 (1905). *See Klamath*, 473 U.S. at 764-65 n.15. This Court then added, "Our inquiry, therefore, is whether a special right, nonexclusive but free of state regulation, was intended to survive in the face of language of the 1901 Agreement ceding 'all . . . right . . . in and to' the ceded lands." *Id.* at 764-65 (omission in original). The Court concluded that no such special right survived such language. The Court later reiterated that its decision applied to off-reservation rights: "The present

case, however, involves the necessarily precedent question whether any off-reservation rights were intended to be preserved at all." *Klamath*, 473 U.S. at 769 n.20.[19]

The Court's analysis and conclusion in *Klamath* is extremely compelling for the analysis of the 1855 Treaty language here. Both agreements have similar phrases conveying "all right, title and interest" of the Indians. Both agreements surrender the Indians' rights "in and to" the land. But the 1855 Treaty at issue here contains several phrases, beyond those in the *Klamath* agreement, demonstrating the sweeping nature of the relinquishment of rights. The treaty includes the words (1) "fully and entirely," (2) "relinquish and convey," (3) "any and all" right, title or interest, (4) "any other lands," and (5) "in the Territory of Minnesota or elsewhere." PA 503. If the language in *Klamath* was sufficient to extinguish previously reserved hunting and fishing rights (even in the face of a savings clause), then even more clearly the words of the 1855 Treaty (and the lack of a savings clause) are sufficient to extinguish such rights here.

B. Available "Historical Context" Is Insufficient To Overcome The 1855 Treaty's Plain Language.

The Eighth Circuit primarily based its conclusion that the 1855 Treaty did not extinguish the Chippewas' privilege in the 1837 Ceded Territory on limited historical

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[19] In *Klamath*, the land ceded under the 1901 Agreement was no longer reservation land. Therefore, any exercise of hunting and fishing rights on that land in the modern era would have changed from exclusive, on-reservation harvest, to shared, off-reservation harvest. The Court started its analysis with the cession language in the 1864 Treaty, where the Tribe ceded "all their right, title, and claim" to a described 22 million acre area. As the Court put it, "that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres *outside* the reservation." *Id.* at 766 (emphasis added).

evidence that suggested the Indians understood the 1855 Treaty as only involving a sale of land to the government and did not intend to surrender the special hunting, fishing and gathering privilege. The court noted that "Chippewa representatives also indicated during negotiations that they would continue to hunt, fish, and gather after the Treaty was negotiated," and that the "Chippewa complained to federal officials that state enforcement of game regulations violated their rights under the 1837 Treaty." PA 36. The district court also concluded that the key provision of the 1855 Treaty quoted above was intended only to convey any rights the Bands may have had in other lands, not described in the treaty, to the north and west of the ceded lands. PA 285-88.

This abbreviated discussion of the evidence regarding the signatories' intent in 1855 is an insufficient basis to disregard the clear, all-encompassing treaty language. While some evidence might be interpreted to support the Bands' views, there is abundant evidence that the Treaty's actual language fit the historical context of the time. The Treaty's negotiation was part of an overall shift in federal policy from removing the Indians from eastern lands to consolidating Indians on reservations. The reservations were defined geographic areas where the Indians were expected to establish, and would be guaranteed, permanent homes. The objective of these treaties, which the Indians understood, was to permit faster white settlement but, at the same time, to preserve for the Indians a traditional homeland where they could permanently reside and presumably acquire the habits and skills of farmers.

The context of extinguishment was reflected in the goals of the Chippewa leaders. During the 1855 Treaty negotiations, Chippewa Chief Hole-in-the-Day, one of the main treaty negotiators, stated that the Indians' survival lay in trying to accommodate the Euro-American civilization that had engulfed them. He advocated for the money

and tools to allow the Indians a chance to stay on their land by adopting the agricultural ways of the whites, rather than continuing the Indians' past subsistence existence. During the treaty negotiations, Hole-in-the-Day made numerous statements about abandoning the old ways and moving forward as white citizens.[20]

The other 1855 Treaty articles amplify this broader context for the cession. In exchange for complete relinquishment of rights by the signatory bands, the Indians were secured permanent reservations in the Minnesota Territory. PA 503-06. In recognition of the Bands' anticipated shift to "living like the whites," Article 9 contains the Bands' agreement

> that they will settle down in the peaceful pursuits of life, commence the cultivation of the soil, and appropriate their means to the erection of houses, opening farms, the education of their children, and such other objects of improvement

[20] Hole-in-the-Day told Commissioner of Indian Affairs Manypenny, "We do not know we will be alive tomorrow; but my great wish and desire is to improve the conditions of the Chippewa nation, and make them live like the whites." JA 302. Later in the negotiations, Hole-in-the-Day complained that the proposed payments by the United States were insufficient "to give us a start, and enable us to support ourselves while preparing to live like the whites." JA 335. He explained that the Chippewa "do not live outside, but within your nation. We are your friends . . . . We want to give ourselves up to your government. We want to cease to be Indians, and become Americans. We want to be citizens, and to have the right to vote. All we desire is to imitate the whites, and to follow their example." JA 338-39. The chief stated that "the Country is getting scarce of game, and we cannot get along without changing our habits. We have tried the old system, and found it wanting. We should therefore try a new one." JA 348. Additionally, he stated that he had studied the Treaty's provisions and concluded that "the Indians have given away all, and leave themselves no alternative but to work." JA 349.

> and convenience, as are incident to well-regulated society . . . .

PA 513. Article 3 included payments of money to the Bands for goods, payments of debts, road construction and "improvement and welfare of [the] Indians," as well as a quantity of land "to be ploughed and prepared for cultivation in suitable fields." PA 507-08. Article 4 permitted the Bands to "employ their own farmers, mechanics, and teachers." PA 510.

As a natural extension of the government's reservation policy and the Indians' cession of all other interests, Congress's intent was clearly to subject all of the Chippewa's off-reservation activities to plenary state regulation. As explained earlier, the Act authorizing the negotiations for the 1855 Treaty provided that the "laws of the United States and the Territory of Minnesota shall be extended over the Chippewa territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian Country.' " 10 Stat. 598 (PA 533). The fact that the 1855 Treaty did not reserve a hunting, fishing and gathering privilege in the lands ceded in that Treaty is also consistent with the view that the federal government intended the Chippewas to have that privilege on the reservations established in the Treaty, but not outside them. Minnesota's Legislature understood and agreed with this goal; one of the first Acts passed in 1858, the first year of statehood, was to set hunting seasons; that Act expressly applied those seasons to Indians hunting off their reservations. 1858 Minn. Laws, chs. XIX, XLIV (PA 569-72).[21]

[21] Again, the extinguishment of the reserved rights did not mean the Indians could not fish and hunt off the reservations, but that such activity must be done pursuant to territorial and, later, state law.

In rejecting the argument that the 1855 Treaty extinguished all prior interests in the 1837 Ceded Territory, the district court cited the 1855 Treaty transmittal letter from Commissioner Manypenny stating that, in addition to the described tract of land ceded by the three signatory bands, the cession included some rights or interests in other lands held by two of the bands "in common with other Indians in Minnesota." PA 285-86. The transmittal letter largely recites the treaty language, and does not provide any further limitation as to the geographic area in which those additional rights were surrendered. The district court concluded, however, that Manypenny must have been indicating that the additional interests relinquished were *only* those held in lands in the northwest portion of the Territory. PA 287. This is not supported by *any* statement of Manypenny or any other government official. While Manypenny correctly reported that the treaty cession would *include* any lands to which the three bands might make claim of title, there is absolutely nothing in Manypenny's statements or elsewhere to contradict the plain language of the treaty – that the bands were relinquishing *all* interests and claims to *any* land in Minnesota, except for the reservation. By imposing the geographic limitation on the Treaty language, the lower court implied an additional treaty provision that was not only found nowhere in the agreement, but simply contradicted the actual terms of the Treaty.

The court of appeals also observed that, in several other treaties, the United States specifically included language revoking hunting, fishing and gathering rights reserved in earlier treaties, so that the omission of an express reference to such rights in the 1855 Treaty indicates that the government did not intend to revoke such rights. PA 36-37. The simple response, of course, is that the 1855 Treaty did not need such a specific provision,

because it contained the all-encompassing relinquishment language described above.

As explained above, this Court has held repeatedly that historical context evidence must be essentially conclusive in order to overcome clear treaty language. If anything, the historical context evidence here supports the State's position, that the treaty language extinguished the previously reserved privilege to hunt, fish and gather free of most state regulation. But, in any event, consistent with this Court's observation in *Klamath*, "[t]he historical record of the lengthy negotiations between the [Indians] and the United States provides no reason to reject the presumption that the . . . Agreement fairly describes the entire understanding between the parties." *Klamath*, 473 U.S. at 772. *See also South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 802 (1998) (historical evidence must "rebut the 'almost insurmountable presumption' that arises from the statute's plain terms"); *United States v. Minnesota*, 270 U.S. 181, 201 (1926) (examining language of instant 1855 Treaty ceding described tract of land: "courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress").

The language of the 1855 Treaty could not be more clear in extinguishing all rights and interests, including the reserved hunting, fishing and gathering privilege, in all lands in Minnesota including the 1837 Territory. This result is compelled not only by the Treaty's plain language and this Court's many plain language decisions, but also by *Klamath*.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be reversed.

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